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JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 33.

PEORIA GAS AND ELECTRIC COMPANY, APPELLANT,

vs.

CITY OF PEORIA, APPELLEE.

MOTION AND NOTICE.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 19004



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 33.

PEORIA GAS AND ELECTRIC COMPANY, APPELLANT,

vs.

CITY OF PEORIA, APPELLEE.

Now come James Hamilton Lewis, corporation counsel of the city of Chicago, and Henry M. Ashton, special counsel for said city, and move that leave be granted them to file within fifteen days or within such time as shall be fixed by the court a reply to the brief filed in the above-named case by William D. Guthrie, counsel for Darius O. Mills.

JAS. HAMILTON LEWIS,
Corporation Counsel of City of Chicago.
HENRY M. ASHTON,
Special Counsel for City of Chicago.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 33.

PEORIA GAS AND ELECTRIC COMPANY, APPELLANT,

vs.

CITY OF PEORIA, APPELLEE.

To Messrs. EDWARD C. RITSHER and WM. T. ABBOTT, Chicago, *Attorneys for Appellant;* Mr. WINSLOW EVANS, Peoria, *Attorney for Appellee;* Mr. WILLIAM D. GUTHRIE, New York, *Attorney for D. O. Mills:*

You are hereby notified that on Monday, the 6th day of November, 1905, at the opening of court on said day, or as soon thereafter as counsel can be heard, we shall move that leave be given James Hamilton Lewis, corporation counsel of the city of Chicago, and Henry M. Ashton, special counsel for the city of Chicago, to file, within fifteen days from said date or within such time as shall be fixed by the court a brief in reply to the brief filed by William D. Guthrie, as counsel for Darius O. Mills in said cause, and shall base said motion upon the affidavit of Henry M. Ashton, copies of which motion and affidavit are hereto attached.

JAS. HAMILTON LEWIS,
Corporation Counsel of City of Chicago.
HENRY M. ASHTON,
Special Counsel of City of Chicago.

STATE OF ILLINOIS, } ss.
County of Cook, }

Henry M. Ashton, being duly sworn, on oath states that on the second day of November, A. D. 1905, before 5 p. m. on said day, he served the above-described notice and copies of the motion and affidavit attached to said notice upon Messrs. Edward C. Ritsher and William T. Abbott, 152 Monroe street, Chicago; Mr. Winslow Evans, Peoria, Illinois, and Mr. William D. Guthrie, 52 Williams street, New York city, by depositing in the United States post-office in the city of Chicago, postage prepaid, and addressed to each of the attorneys above mentioned at their respective addresses, copies of the foregoing notice and of the motion and affidavit thereto attached.

HENRY M. ASHTON.

Subscribed and sworn to before me this 2d day of November, A. D. 1905.

[SEAL.] MARSHALL GALLION,
Notary Public.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1905.

PEORIA GAS AND ELECTRIC COMPANY, *Appellant*,
vs.
CITY OF PEORIA, *Appellee.* } No. 33.

STATE OF ILLINOIS, } ss.
County of Cook, }

Henry M. Ashton, being first duly sworn, on oath states that he is the special counsel for the city of Chicago in the suit of Darius O. Mills *vs.* The City of Chicago and The People's Gas Light and Coke Company, now pending in the

circuit court of the United States for the northern district of Illinois, eastern division thereof.

This affiant further states that on the 30th day of October, 1905, William D. Guthrie, counsel for Darius O. Mills in the suit last mentioned and now pending in the said circuit court of the United States for the northern district of Illinois, eastern division, was granted leave by this court, as this affiant has been informed, to file and did file a brief covering some forty-four pages as a friend of the court and for the reason that the above-entitled cause involves the question as to whether the cities and villages in the State of Illinois had the power by ordinance to regulate the price of gas charged by them, and that the same question is involved in the said suit of Mills *vs.* The City of Chicago.

This affiant further states that neither himself nor the corporation counsel of the city of Chicago had any notice or knowledge until the 1st day of November, 1905, that said application had been made or granted, and this affiant states that the said city of Chicago has the same interest in being permitted to file a brief in this cause as did the said Darius O. Mills, and for that reason the motion of this affiant and the said James Hamilton Lewis, as attorneys for the city of Chicago, should be granted and they should be given leave, within fifteen days or within such time as may be fixed by the court, to file a reply to the brief of said William D. Guthrie.

HENRY M. ASHTON.

Subscribed and sworn to before me this 2d day of November, A. D. 1905.

[SEAL.] MARSHALL GALLION,
Notary Public.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 33.

PEORIA GAS AND ELECTRIC COMPANY, *Appellant*,

vs.

CITY OF PEORIA.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF ON BEHALF OF DARIUS O. MILLS, PARTY TO ANOTHER PENDING CASE INVOLVING THE QUESTION OF POWER OF CITIES IN ILLINOIS TO FIX THE PRICE OF GAS.

WILLIAM D. GUTHRIE,
Of counsel for Darius O. Mills.

Washington, October 30, 1905.

[19,367]

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1905.

No. 33.

PEORIA GAS AND ELECTRIC COMPANY, *Appellant*,

vs.

CITY OF PEORIA.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF ON BEHALF OF DARIUS O. MILLS, PARTY TO ANOTHER PENDING CASE INVOLVING THE QUESTION OF POWER OF CITIES IN ILLINOIS TO FIX THE PRICE OF GAS.

STATEMENT OF THE QUESTION PRESENTED.

The case at bar involves the validity of an ordinance of the city council of the city of Peoria, passed September 4, 1900, providing that "the maximum price of gas furnished the city of Peoria and its citizens and all consumers of gas therein, shall not exceed the sum of seventy-five cents (75 cts.) per thousand cubic feet"; prescribing the quality of gas so furnished, and imposing upon "any company, corporation, person or persons" who shall exact a greater sum "a penalty of not less than twenty-five ($25) dollars, nor more than two hundred ($200) dollars for each and every offense," and a similar penalty for each and every permanent removal of a meter from the premises of any

such consumer of gas who is willing to pay for the gas furnished him "the price established and fixed" therein (record, pp. 17, 48).

By an amendment to the bill of complaint, it was alleged "that the only power or authority vested in said city to pass such ordinance" was "the supposed authority granted to it by the legislature of the State of Illinois as contained in clause thirteen, sec. 1, art. V, chap. 24 of the Revised Statutes of Illinois, of the general incorporation act for cities, towns and villages in said State" (which clause is then set out in full in said amendment), and also "by virtue of the general police powers delegated to it by the legislature of the said State of Illinois" (record, pp. 32–33). The provisions thus alleged as the supposed basis of power and authority to pass the ordinance in question may be more conveniently referred to as subdivisions *thirteenth* and *sixty-sixth* of section 1, article V, of the City and Village Act, approved April 10, 1872, in force July 1, 1872 (1 Starr & C. Ann. Stat., 2d ed., pp. 689, 695, 707), which read as follows:

> "§ 1. The city council in cities, and president and the board of trustees in villages, shall have the following powers: . . .
>
> "*Thirteenth.*—To regulate the openings therein [in streets] for the laying of gas or water mains and pipes, and the building and repairing of sewers, tunnels and drains, and erecting gas lights: *Provided, however*, that any company heretofore organized under the general laws of this state, or any association of persons organized, or which may be hereafter organized for the purpose of manufacturing illuminating gas to supply cities or villages, or the inhabitants thereof, with the same, shall have the

right, by consent of the common council (subject to existing rights), to erect gas factories, and lay down pipes in the streets or alleys of any city or village in this state, subject to such regulations as any such city or village may by ordinance impose."

"*Sixty-sixth.*—To regulate the police of the city or village, and pass and enforce all necessary police ordinances."

The bill of complaint, among other things, prayed that "the said ordinance of September 4th, A. D. 1900, may be adjudged and delared invalid, null and void" (record, p. 20).

In the answer of the "City of Peoria to the bill of complaint as amended" (record, p. 32), it was alleged "that as to the allegation in said bill that said ordinance is void for want of power in the city council of said city to pass the same, respondent can neither admit nor deny such statement, but alleges that said ordinance was passed in good faith by said common council and in the belief that it had power to pass ordinances for the promotion of the welfare of the inhabitants of the said city and to prevent acts of wrong, injustice and extortion from being practised against said inhabitants" (record, p. 28).

The special master, to whom the cause was referred, concluded as a proposition of law that "the city of Peoria (defendant) has the right under the laws of the State of Illinois, to pass ordinances regulating the maximum price to be charged for gas furnished by complainant to its citizens" (record, p. 57, conclusion 4), and again, that "the state has conferred upon defendant the right, within its corporate boundaries, to lay out

streets, to regulate the use of the same, and to grant complainant the right to occupy the same for the purpose of laying its mains and connecting service pipes for the distribution of gas, subject, however, to such regulations as it might by ordinance impose" (record, p. 58, conclusion 9). The final conclusion, however, was that "the ordinance in controversy in this case is unreasonable in respect to the price as therein fixed," and that "the enforcement of its provisions against complainant would constitute the taking of the property of the complainant without due process of law" (record, pp. 61–62, conclusion 25).

The Circuit Court, however, while recognizing the existence of the questions "that the city council had no power to pass the ordinance, that the rate as fixed by the ordinance is unreasonably low," and "that its enforcement would deprive the complainant of its property without due process of law," declined to decide either of these questions because of its decision that the complainant, having entered into an illegal combination in violation of the Illinois anti-trust law (act approved June 11, 1891, in force July 1, 1891; L. of Ill. 1891, p. 206), the bill of complaint should be dismissed for want of equity and the injunction theretofore issued to prevent the enforcement of said ordinance should be dissolved (record, pp. 98, 140, 142, 144). The complainant thereupon appealed to this court, and the injunction was continued pending such appeal (record, pp. 143, 145).

The question of the power of the city council of the city of Peoria to enact the ordinance of September 4, 1900, under the provisions of law above set out, is, therefore, before the court, and, if the decision of the

Circuit Court dismissing the bill for want of equity, because of the complainant's alleged violation of the Illinois anti-trust statute, be not sustained, the questions decided by the master as to the power to enact the ordinance and as to its reasonableness will then be squarely presented. With the question of reasonableness this brief is not concerned. The question, however, of the power of city councils under the City and Village Act of 1872, to fix the price of gas, applies alike to the city councils of Chicago and of Peoria, and this brief is filed on behalf of Darius O. Mills, who is the complainant in a suit now pending in the Circuit Court of the United States for the northern district of Illinois, wherein the power of the city council of Chicago under the provisions of that statute to pass an ordinance on October 15, 1900, in all respects similar to the ordinance of the city council of Peoria, passed September 4, 1900, is drawn in question. The decision of Circuit Judge Grosscup on demurrer to the bill of complaint in such other pending suit is reported as *Mills* v. *City of Chicago*, 127 Fed. Rep. 731, and reference thereto will show that the ordinance there involved and the question of power to enact it are substantially identical with the ordinance and question of power in the case at bar, and that the court held that no such power had been delegated to the city council of Chicago.

Subsequently, in May, 1905, the legislature of Illinois expressly conferred upon the city council of the city of Chicago the power "to prescribe by ordinance maximum rates and charges for the supply of gas" (L. of Ill. 1905, p. 11[illegible]; see appendix to this brief).

As the ordinance in the case at bar is alleged to have been passed and adopted by the city council of the city of Peoria "under the supposed authority granted to it by the legislature of the state of Illinois as contained in" the statute above set out (record, p. 32), and as the answer of the city of Peoria "alleges that said ordinance was passed in good faith by said common council and in the belief that it had power to pass ordinances for the promotion of the welfare of the inhabitants of said city" (record, p. 28), and as the invalidity of said ordinance is claimed, not only because of the want of power in the city council under the laws of the state of Illinois, but also, because it is so unreasonable in its operation as to deprive the complainant of its property without due process of law and deny it the equal protection of the laws, in violation of the constitution of the United States (record, p. 19), which latter claim was sustained by the master to whom the cause was referred (record, pp. 60, 61, conclusions 18, 25), this is not a case where the jurisdiction is defeated because it proceeds alone upon the theory that the ordinance in question was void because it was not passed under legislative authority and hence was not action by the state of Illinois within the meaning of the Constitution (*Hamilton Gas Light Co.* v. *Hamilton City*, 146 U. S. 258, 265; *Barney* v. *City of New York*, 193 U. S. 430, 437). On the contrary, the case comes well within that class of cases where the jurisdiction is sustained because it appears that the defendant grounded its right to enact the ordinance in question upon supposed legislative authority which it assumed had been

delegated to it by the state in a designated act of the legislature, and which act, if construed as conferring the authority claimed, would violate rights secured by the Constitution. The master, as stated above, actually construed the statute as conferring the authority claimed and held that rights secured by the federal constitution had been violated (record, pp. 57, 58, 59, 61, conclusions 4, 9, 12, 18, 25). *Hamilton Gas Light Co.* v. *Hamilton City*, 146 U. S. 258, 265–266; *City Railway Co.* v. *Citizens' Railroad Co.*, 166 U. S. 557, 564; *Penn Mutual Life Insurance Co.* v. *Austin*, 168 U. S. 685, 694; *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, 7–10; *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 142, 147–148; *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U. S. 65, 81–82; *Davis & Farnum Mfg. Co.* v. *Los Angeles*, 189 U. S. 207, 216–217; *Cleveland* v. *Cleveland City Ry. Co.*, 194 U. S. 517, 530–531; *Savannah, Thunderbolt, &c., Ry.* v. *Savannah*, 198 U. S. 392, 396.

In such a case, it is well settled, this court is not restricted to the consideration of the federal question, but acquires jurisdiction of the entire case and of all questions involved in it. *Field* v. *Barber Asphalt Co.*, 194 U. S. 618, 620–621; *Davis & Farnum Mfg. Co.* v. *Los Angeles*, 189 U. S. 207, 216; *Penn Mutual Life Insurance Co.* v. *Austin*, 168 U. S. 685, 695; *Scott* v. *Donald*, 165 U. S. 58, 73; *Press Publishing Co.* v. *Monroe*, 164 U. S. 105, 111; *Chappell* v. *United States*, 160 U. S. 499, 509; *Casey* v. *Houston, &c., Ry. Co.*, 150 U. S. 170, 181; *Horner* v. *United States*, 143 U. S. 570, 576–577.

I.

THE ESTABLISHED RULES OF STATUTORY CONSTRUCTION APPLICABLE TO THE POWERS OF MUNICIPAL CORPORATIONS.

In the case of *Barnett* v. *Dennison*, 145 U. S. 135, 139, Mr. Justice Brown, delivering the unanimous opinion of the court, said:

> "It is the settled doctrine of this court that municipal corporations are merely agents of the state governments for local purposes, and possess only such powers as are expressly given, or implied because essential to carry into effect such as are expressly granted."

This principle was reiterated in the strongest language in *Atkin* v. *Kansas*, 191 U. S. 207, 220.

And such is also the settled doctrine in Illinois. Thus in *City of Chicago* v. *Blair*, 149 Illinois, 310, 318, the Supreme Court of Illinois said that—

> "The tendency of municipal government to arrogate to itself power and to encroach upon the rights of the citizen has led to the establishment of the statutory rules of construction limiting its powers to those expressly granted, or arising, by reasonable and necessary implication, from the grant."

And in the recent case of *Coquard* v. *Village of Oquawka*, 192 Illinois, 355, 365 (1901), the court said:

> "This court, as well as the Supreme Court of the United States, has quoted with approval the rule laid down by Judge Dillon in his work on Municipal Corporations, that 'a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation

—not simply convenient, but indispensable' (*Cook County* v. *McCrea*, 93 Ill. 236; *Huesing* v. *City of Rock Island*, 128 *id.* 465; *Merrill* v. *Monticello*, *supra*[1].) 'Any reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.' See, also, *Marsh* v. *Fulton*, 10 Wall. 676; *Ottawa* v. *Carey*, 108 U. S. 110; *Jonesboro* v. *Cairo*, 110 *id.* 192; *Kelly* v. *Milan*, 127 *id.* 139."

In *Kiel* v. *City of Chicago*, 176 Illinois, 137, 141, the court said:

"The power to pass an ordinance and impose a penalty for its violation is to be strictly construed, and is not to be extended, by implication, to persons or things not expressly within the terms of such power."

So, also, in *Smith* v. *McDowell*, 148 Illinois, 51, 62, the court said:

"These municipal corporations are instrumentalities of the state, exercising such powers as are conferred upon them in the government of the municipality. Their power is measured by the legislative grant, and they can exercise such powers only as are expressly granted, or are necessarily implied from the powers expressly conferred."

See, also, *Freeport Water Co.* v. *Freeport City*, 180 U. S. 587, 598; *Citizens' St. Ry.* v. *Detroit Railway*, 171 U. S. 48, 54; *Detroit Citizens' St. Ry. Co.* v. *City of Detroit*, 64 Fed. Rep. 628, 639; *Old Colony Trust Co.* v. *City of Atlanta*, 83 Fed. Rep. 39, 44, affirmed 88 Fed. Rep. 859; *Cleveland City Ry. Co.* v. *City of Cleveland*, 94 Fed. Rep. 385, 396, affirmed

[1] 138 U. S. 673, 681.

194 U. S. 517; *Laugel* v. *City of Bushnell*, 197 Illinois, 20, 27; *Town of Drummer* v. *Cox*, 165 Illinois, 648, 650; *City of Chicago*, v. *McCoy*, 136 Illinois, 344, 353; *Seeger* v. *Mueller*, 133 Illinois, 86, 94; *Emmons* v. *City of Lewistown*, 132 Illinois, 380, 384; *Huesing* v. *City of Rock Island*, 128 Illinois, 465, 477; *Lewisville Natural Gas Co.* v. *State*, 135 Indiana, 49, 51; *City of Noblesville* v. *Noblesville Gas, etc., Co.*, 157 Indiana, 162, 167; *Muncie Natural Gas Co.* v. *City of Muncie* (Ind. 1903), 66 N. E. 436, 438; *In re Pryor*, 55 Kansas, 724, 727; *City of St. Louis* v. *Bell Telephone Co.*, 96 Missouri, 623, 628; *Wabaska Electric Co.* v. *City of Wymore*, 60 Nebraska, 199, 202; *Schroeder* v. *Gas & Water Co.*, 20 Pa. Superior Ct. 255, 259; *Tacoma Gas & Electric Light Co.* v. *Tacoma*, 14 Washington, 288, 291; *State ex rel. Telephone Co.* v. *City of Sheboygan*, 111 Wisconsin, 23, 38.

It necessarily follows from these decisions that all doubts concerning the existence of power in a municipal corporation are to be resolved against it and in favor of the citizen, and that the presence of a fair and reasonable doubt is fatal to the existence of such power. *Minturn* v. *Larue*, 23 How. 435, 436; Dillon Municip. Corp., 4th ed. § 89; *Seeger* v. *Mueller*, 133 Illinois, 86, 94; *Emmons* v. *City of Lewistown*, 132 Illinois, 380, 384; *Coquard* v. *Village of Oquawka*, 192 Illinois, 355, 365; *Laugel* v. *City of Bushnell*, 197 Illinois, 20, 27; *Lewisville Natural Gas Co.* v. *State*, 135 Indiana, 49, 51; *Schroeder* v. *Gas & Water Co.*, 20 Pa. Superior Ct. 255, 259.

In the case of *Laugel* v. *City of Bushnell*, 197 Illinois, 20, 27, decided in June, 1902, since the adoption of the ordinance in question, the Supreme Court of Illinois used the following language:

> "The court [referring to the case of *Emmons* v. *City of Lewistown*, 132 Ill. 380, 384, *supra*], correctly remarked that to concede that it was doubtful whether the legislature had granted such power was to deny the existence of the power."

And in *Seeger* v. *Mueller*, 133 Illinois, 86, the court had said (p. 94):

> "Any fair, reasonable doubt concerning the existence of any power is resolved against the corporation, and the power is denied."

So, in *Interstate Com. Commission* v. *Railway Co.*, 167 U. S. 479, 494, this court in denying that Congress had empowered the Interstate Commerce Commission to fix transportation rates, among other things, said:

> "The question debated is whether it vested in the commission the power and the duty to fix rates; and the fact that this is a debatable question, and has been most strenuously and earnestly debated, is very persuasive that it did not. The grant of such a power is never to be implied."

And, in *City of Fort Scott* v. *W. G. Eads Brokerage Co.*, 117 Fed. Rep. 51, 54, the Circuit Court of Appeals for the eighth circuit, Sanborn, C. J., delivering the opinion of the court, among other things, said:

> "Municipal corporations are the creatures of the statutes under which they are organized and operated. By those statutes their powers are granted, measured and limited. Beyond the limits of the powers there expressly granted and those fairly im-

plied therefrom or incident thereto, they cannot lawfully act or agree to act, and a fair and reasonable doubt of the existence of a corporate power is fatal to its being."

In the light of these established principles, we may now analyze the statutory provisions relied on by the city of Peoria as conferring the power to fix or regulate the price of gas.

II.

APPLICATION OF THE ESTABLISHED PRINCIPLES OF CONSTRUCTION TO THE STATUTE UNDER CONSIDERATION.

It cannot be seriously contended that the City and Village Act of 1872 conferred the power to fix the maximum price of gas in express terms. The only claim is that the power may be implied as incident to the following powers expressly granted to city councils, viz.: (1) to provide for the erection of gas factories and the laying down of pipes, and (2) to regulate the police of the city and to pass and enforce all necessary police ordinances. The scheme of the act of 1872 is that of a general statute covering the incorporation of cities and villages and dealing in a comprehensive form with the powers to be exercised by them. Certain specific powers were delegated to the city council in cities, including the powers above stated, which are conferred in and by the *thirteenth* and *sixty-sixth* subdivisions of section 1, article V, of the City and Village Act of 1872, *supra* (1 Starr & C. Ann. Stat. 2d ed., pp. 689, 695, 707), as follows:

"§ 1. The city council in cities, and president and the board of trustees in villages, shall have the following powers: . . .

"*Thirteenth.*—To regulate the openings therein [in streets] for the laying of gas or water mains and pipes, and the building and repairing of sewers, tunnels and drains, and erecting gas lights: *Provided, however,* that any company heretofore organized under the general laws of this state, or any association of persons organized, or which may be hereafter organized for the purpose of manufacturing illuminating gas to supply cities or villages, or the inhabitants thereof, with the same, shall have the right, by consent of the common council (subject to existing rights), to erect gas factories, and lay down pipes in the streets or alleys of any city or village in this state, subject to such regulations as any such city or village may by ordinance impose."

"*Sixty-sixth.*—To regulate the police of the city or village, and pass and enforce all necessary police ordinances."

Aside from the fact that there is nothing in the language above quoted which would imply any intention to vest the important power of fixing and regulating the price of gas, an analysis of the City and Village Act of 1872 will show conclusively that the legislature did not intend to delegate to the city council the power to regulate the rates or prices of gas companies.

The statute expressly dealt with the subject of delegating to city councils the power to regulate the rates or charges of those engaged in various businesses, but it omitted any delegation of power to regulate the price or charges of gas. Thus, the express power was delegated to city councils—

1. "To fix the rate of wharfage and dockage" (Art. V, subdiv. 36).

2. "To prescribe the compensation" of hackmen,

omnibus drivers "and all others pursuing" like occupations (subdiv. 42).[1]

3. "To establish ferries, toll bridges, and license and regulate the same, and, from time to time, fix tolls thereon" (subdiv. 87).

4. "To authorize any person or private corporation to construct and maintain [water works] at such rates as may be fixed by ordinance" (Art. 10, subdiv. 1).

These provisions are found in the same statute of which other provisions are now claimed impliedly to authorize the fixing of the price of gas.[2] Indeed, they are all subdivisions of the same section which purports to enumerate the powers of cities and villages in the state,[3] except the provision as to waterworks, which will be found in a subsequent article of the same statute.[4]

In *pari materia* to these provisions expressly conferring municipal power to fix the rates of charge by individuals or private corporations for certain designated *quasi* public services, are also other statutes, namely, conferring power on any city or village to "fix the rates of toll" on bridges and ferries owned by it (L. of Ill. 1877, p. 61; 1 Starr & C. Ann. Stat., 2d ed., p. 818; L. of Ill. 1881, p. 57; L. of Ill. 1891, p. 72; 1 Starr & C. Ann. Stat., 2d ed., p. 819); authorizing cities, towns and villages owning and operating water-works to "assess and collect" such

[1] This has been construed to include street cars. *Union Traction Co.* v. *City of Chicago*, 199 Illinois, 484, 519.

[2] City and Village Act, L. 1871–1872, p. 218.

[3] § 1 of art. V, subds. 13th, 16th, 42nd, 66th, 87th, p. 227 *et seq.*

[4] § 1 of art. 10, p. 259.

"rates for the use and benefit of water" supplied by such waterworks as they "shall deem just and expedient" (L. of Ill. 1873, p. 191; 1 Starr & C. Ann. Stat., 2d ed., p. 864); providing that "the county board shall fix the rate of ferriage at each ferry" (R. S. of Ill. 1845, p. 253; R. S. of Ill. 1874, p. 531; 2 Starr & C. Ann. Stat., 2d ed., p. 1957), and shall also "fix the rates of toll" on toll bridges (R. S. of Ill. 1845, p. 253; R. S. of Ill. 1874, p. 1060; 3 Starr & C. Ann. Stat., 2 ed., p. 3904), and "fix from time to time such rates of toll to be charged" on toll roads "as may be deemed just and proper and for the public good" (L. of Ill. 1877, p. 211; 3 Starr & C. Ann. Stat., 2d ed., p. 3908); directing the board of railroad and warehouse commissioners to make "a schedule of reasonable maximum rates of charges for the transportation of passengers and freight and cars" on railroads doing business in the state (L. of Ill. 1873, p. 139; L. of Ill. 1873–1874, p. 129; L. of Ill. 1885, p. 232; 3 Starr & C. Ann. Stat., 2 ed., p. 3314); declaring that said board "shall, also, have power to fix the rate of charges for the inspection of grain" (L. of Ill. 1871–1872, p. 768; 3 Starr & C. Ann. Stat., 2d ed., p. 3322; L. of Ill. 1897, p. 301); and prescribing "the maximum charge for storage and handling of grain" (L. of Ill. 1871–1872, p. 769; L. of Ill. 1877, p. 170; 3 Starr & C. Ann. Stat., 2d ed., p. 3323.)

It, therefore, appears that the legislature was entirely familiar with the terms usually employed in conferring upon a municipality the power to fix rates and charges. Manifestly, if it had intended to confer power to fix the price of gas it would have done so when the subject of gas

was under consideration, by the use of the same exact and simple language deemed by it necessary for that purpose in the case of street cars, hackmen, wharves, docks, ferries, toll bridges, waterworks, railroads and grain elevators. As Mr. Justice Brewer said in *Interstate Com. Commission* v. *Railway Co.*, 167 U. S. 479, 495, speaking of the power to regulate rates:

> "The language by which the power is given had been so often used and was so familiar to the legislative mind and is capable of such definite and exact statement that no just rule of construction would tolerate a grant of such power by mere implication."

It is, therefore, reasonable to assume that the legislature deemed it necessary to confer the power to fix rates by express words, as it did in the case of street cars, hackmen, wharves, docks, ferries, toll bridges, waterworks, railroads and grain elevators and that its omission of any grant of such power in respect of gas and other public utilities is of conclusive significance, and precisely as if it had declared that it would not grant the power. The case of *City of Cairo* v. *Bross*, 101 Illinois, 475, 478, would seem to be exactly in point. The court, by Mr. Justice Mulkey, there said:

> "When the legislature, by the general incorporation act, declares that the corporate authorities of cities and villages organized and acting under its provisions shall have power to license certain occupations and kinds of business, specifically enumerating them, such declaration must, by a familiar canon of construction, be construed precisely as if the act in express terms inhibited the licensing of all trades and occupations not contained in the enumeration. In discussing this principle, the Supreme Court of

> the United States, in *Thomas* v. *West Jersey Railroad Co.*, 101 U. S. 82, says: 'Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of those powers implies the exclusion of all others.'"

In *C. & N. W. Ry. Co.* v. *City of Chicago*, 148 Illinois, 141, 159, the court quotes with approval the following from Endlich on Interpretation of Statutes, sec. 399:

> "Where there is in the same statute a particular enactment, and also a general one, which, in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment."

And in *Kiel* v. *City of Chicago*, 176 Illinois, 137, 140, the court expressly limited one of the very provisions now in question, namely, clause 66, conferring power to pass police ordinances, and said:

> "The powers conferred by the last two clauses are express powers specifically enumerated, and by a familiar canon of construction it will be presumed the act in express terms inhibited the licensing of all trades and occupations not contained in the enumeration. The principle is, that a power may be fairly implied as to police, but where a power is expressly enumerated in the charter of a corporation that is the measure thereof, and the enumeration of such power implies the exclusion of all others. *City of Cairo* v. *Bross*, 101 Ill. 475; *Huesing* v. *City of Rock Island*, 128 *id.* 465. Clause 66, having reference to authority to

pass police ordinances, does not extend the express power conferred by the provisions of clause 91."

The point now being discussed arose in *Tacoma Gas & Electric Light Co.* v. *Tacoma*, 14 Washington, 288, as to water and gas regulation, and the principle of construction so firmly established by the Illinois decisions was applied. It was held that no power existed in the municipality to fix the price of gas, the court, by Scott, J., saying (p. 293):

> "It is worthy of note that the legislature thus in two paragraphs relating to kindred subjects, expressly conferred the power to fix the price of water, and withheld it as to gas or other light, *thus limiting the power over purveyors of gas to 'regulation.'* . . . It is sufficient to say, however, that the legislature having passed a general law upon the particular subject, the power to fix such rates must be found therein, if at all."

So, in *City of St. Louis* v. *Bell Telephone Co.*, 96 Missouri, 623, 632, holding that the general police power to "regulate" telephones and telephone companies, did not include the power to fix maximum telephone rates, the court, by Black, J., said:

> "To say that under this general power the city may fix rates for telephone services would be going entirely too far. *This conclusion is manifest when we consider that the charter points out with particularity those cases in which the city may fix rates and charges.*"

Not only has the legislature thus by conferring power to fix rates other than gas rates expressed its intention to withhold the power to fix gas rates, but it has even more directly expressed that intention by its special action on the subject of gas rates in the act of June 5,

1897 (L. of Ill. 1897, p. 177) and in the act of May 18, 1905 (L. of Ill. 1905, p. 111).

This power over prices does not seem to meet any of the tests of implied powers (Dillon's Mun. Corps., sec. 89, already cited), but is a power which stands by itself, and may be granted or not as the legislature may see fit, being so essentially distinct from other powers that it cannot be granted by implication.

A.

AS TO SUBDIVISION THIRTEENTH OF SECTION 1, ARTICLE V, OF THE CITY AND VILLAGE ACT.

Subdivision *thirteenth* of section 1, of article V, of the City and Village Act of 1872 confers power "to regulate the openings" in streets, and makes the erection of gas factories and the laying down of pipes "in the streets or alleys of any city or village in this state, subject to such regulations as any such city or village may by ordinance impose."

Applying to this provision the settled rules of construction heretofore adverted to, it is clear that the legislature never intended thereby to delegate the power to fix the prices to be charged for gas. It was so construed by the Circuit Court of the United States for the northern district of Illinois in the case, now pending in that court, of *Mills* v. *City of Chicago*, 127 Fed. Rep. 731, where Circuit Judge Grosscup held that the city council of Chicago had no power to fix gas rates, and said (p. 734):

> "The chief claim of the city is based on the thirteenth section. The section reads as follows:
>
> "'To regulate the openings therein [in streets] for the laying of gas or water mains and pipes,

and the building and repairing of sewers, tunnels and drains and erecting gas lights: *Provided, however*, that any company heretofore organized under the general laws of this state, or any association of persons organized or which may be hereafter organized for the purpose of manufacturing illuminating gas to supply cities or villages, or the inhabitants thereof, with the same, shall have the right, by consent of the common council (subject to existing rights), to erect gas factories, and lay down pipes in the streets or alleys of any city or village in this state, subject to such regulations as any such city or village may by ordinance impose.'"

"Read as an entirety, the section clearly grants no general power to regulate rates. Thus treated, the last clause, 'subject to such regulations as any such city or village may by ordinance impose,' relates back to, and is limited by, the opening clause which is taken up solely in the regulation of openings in streets for the laying of gas or water pipes. But the court is asked, first, to divorce the proviso from the balance of the section, so that the proviso may stand as a section apart, and then to interpret the concluding clause as if the word 'regulations' was meant to include the rates at which gas should be manufactured and sold, as well as the manner in which the gas factories should be erected and the pipes laid. I do not feel myself at liberty to close my eyes to the proviso. Presumably it was meant to be read in connection with the whole section. But if I did, it would be unavailing. The context shows that the last clause was not intended to confer upon the city council plenary power to regulate rates, as well as the manner in which gas factories should be erected and pipes laid down. The mere laying of gas pipes, and the installation of gas plants, together with their repair, are the subject matter of a power widely separable in circumstance and in substance, from power

to deal with the rates at which gas shall be manufactured and sold. The first belongs naturally to the city whose streets are to be occupied, for it is related intimately with the supervision of streets; the latter, with equal reason, is foreign naturally to the city, for the city is one of the parties in interest; and power to regulate prices ought not, in the usual course of affairs, to go to a party interested. Until there is legislation, more unmistakable than the language used in this section, to indicate a purpose to grant the city power to fix rates, I shall not hold that such was the legislative intent. Unquestionably the power resides somewhere in the state, but until consciously delegated to some other body it remains in the state's general repository of power, the general assembly of the state.

"I may add that in this interpretation, I am but following the opinions of Mr. Francis Adams, Mr. Wm. G. Beale, Mr. C. S. Darrow, and Mr. John W. Green, rendered by them severally as corporation counsel, as also what I take to be the opinion of Mr. Walker, during his incumbency of that office."

The opinions referred to are printed at length in an official publication entitled "Opinions of the corporation counsel and assistants from January, 1872, to March, 1897," which was published in the latter year "by direction of the city council under the supervision of the corporation counsel," Mr. William G. Beale. These opinions, emanating from the legal department of the principal city of the state, the officers of which are charged with the duty of rendering such opinions, and upon the precise question, involving as well the power of the city of Peoria as that of the city of Chicago, are entitled to great consideration. Chicago Charter of 1863, c. III., § 7, L. 1863, p. 50; City and Village Act,

Art. VI., §§ 2, 3, L. 1871–1872, pp. 236, 237; Mun. Ord., 1881, p. 192, 1890, p. 428, 1897, vol. 1, p. 15; *People* v. *Kipley*, 171 Illinois, 44, 77; *People* v. *Fidelity and Casualty Co.*, 153 Illinois, 25, 39; *Potter* v. *Hall*, 189 U. S. 292, 298, 300; *Southern Pacific Railroad Co.* v. *Bell*, 183 U. S. 675, 682, 685; *Hewitt* v. *Schultz*, 180 U. S. 139, 156, 157.

The power conferred is the power of "regulation" in respect of the streets and alleys, and the power to fix rates of charge by public utility corporations using the streets or alleys is never to be implied as incident to such power of regulation.

In *St. Louis* v. *Western Union Telegraph Co.*, 149 U. S. 465, 471, it was pointed out that this power to fix rates was not incident to a power to regulate the use of streets, Mr. Justice Brewer saying:

> "The relation of a telephone or telegraph company to its patrons, after the use of the streets has been granted, does not affect the use, and power to regulate the use does not carry with it by implication power to regulate the dealings between the corporation having such use and its individual patrons."

In *City of St. Louis* v. *Bell Telephone Co.*, 96 Missouri, 623, 629, the court, by Black, J., said:

> "The city places some reliance on its general power to regulate the use of the streets. This power extends to new uses as they spring into existence from time to time, as well as to uses common and known at the time of the dedication or grant of the power to the municipal corporation. *Ferrenbach* v. *Turner*, 86 Mo. 416. The erection and maintenance of telephone poles is one of these new uses; and is a proper use of the streets. *Julia Building Ass'n* v. *Bell Telephone Co.*

88 Mo. 258. That the company is subject to reasonable regulations prescribed by the city, as to planting its poles and stringing its wires and the like, is obvious. Such regulations have been obeyed by this defendant.

"Conceding all this, we are at a loss to see what this power to regulate the use of the streets has to do with the power to fix telephone charges. The power to regulate the charges for telephone service is neither included in nor incidental to the power to regulate the use of streets, and the ordinance cannot be upheld on any such ground."

In the recent case of *State ex rel. Garner* v. *Missouri & K. Telephone Co.* (Missouri Supreme Court, June 1, 1905), 88 S. W. Rep. 41, a city charter had been framed under a constitutional grant of such power to the city "for its own government, consistent with and subject to the constitution and laws of this state," and under an enabling act of the legislature pursuant thereto authorizing the proposed charter "to provide for regulating and controlling the exercise by any person or corporation of any public franchise or privilege in any of the streets or public places of such city." The charter so framed contained an express provision authorizing the city to fix the maximum rates for telephone service, but it was held that this provision was unauthorized and void. Referring to the power of the city to frame a charter for its own government, the court said (p. 43):

"The regulation of prices to be charged by a corporation intrusted with a franchise of a public utility character is within the sovereign power of the state that grants the franchise or that suffers it to be exercised within its borders, and that power may be with

wisdom and propriety conferred on a municipal corporation; but it is not a power appertaining to the government of the city, and does not follow as an incident to a grant of power to frame a charter for a city government."

And, referring to the power given the city to regulate and control the use of the streets, the court said (p.44):

"Under the power the city may regulate the planting of poles, wires, etc., or require the wires to be put under ground, or do anything within reason to render the use of the street by the private corporation as little of injury to the public as may be. But the section does not confer on the city the power to regulate the prices to be charged by the telephone company for its service to the inhabitants of the city."

In *State* v. *Sheboygan*, 111 Wisconsin, 23, 38, 39, the court, by Bardeen, J., said:

"The fixing of maximum charges for use of telephones or service in the city is said to be a lawful police regulation to prevent extortion. This is based upon the assumption that the power of police control possessed by the city is unlimited. Such is not the fact. Such power is inherent in the state, and is a necessary attribute of sovereignty. . . . The power to regulate charges was not included in or incidental to the power to regulate the manner of using streets. There was not the remotest relation between them. The attempt of the city to justify its position on that ground must fail."

In the case of *In re Pryor*, 55 Kansas, 724, it was held that a municipality did not have the power to fix maximum gas rates under a general grant of power to regulate, and the court, by Martin, C. J., said (pp. 724, 728, 729):

"In certain cases the state may fix and regulate

the prices of commodities and the compensation for services, but this is a sovereign power, which may not be delegated to cities or subordinate subdivisions of the state, except in express terms or by necessary implication. . . . Under the section of our statute hereinbefore fully quoted, a gas or water company may lay its pipes and mains through the streets of a city only with the consent of the municipal authorities, and *under such regulations as they may prescribe*; but the regulations are only as to the laying of pipes and mains, and have nothing to do with the price of the gas or water passing through the pipes and supplied to consumers."

In *Old Colony Trust Co.* v. *City of Atlanta*, 83 Fed. Rep. 39 (affirmed 88 Fed. Rep. 859), District Judge Newman said (pp. 43, 44):

"First, the power of 'regulation' does not necessarily embrace the power to fix rates of charge. There are many matters for it to cover without embracing this latter power. The city unquestionably has the right, within any reasonable limit, to regulate the speed of cars and other matters connected with their movement on the streets; where poles shall be placed in the case of overhead wires; how wires shall be located, and their location with reference to other wires and the safety of the same; and to do many other things which might be noted with reference to the occupancy of the streets, protection to life and limb thereon, and all such matters as involve the safe and orderly use of the streets over which it has, under the legislature, full power and control. . . . We hold, moreover, that, before the city can exercise the power to fix rates of fare for a street-railroad company, it must obtain that power in express terms, or it must arise by necessary implication from the words used in the legislative act. The power of the state over the

> subject-matter need not be discussed. We are dealing with the power of a municipality, a creature of the legislature, which derives all its authority from the legislature, and can only act within the limits of the legislative grant."

In *Lewisville Natural Gas Co.* v. *State*, 135 Indiana, 49, 52, the court held that a legislative grant of authority to a municipality to provide "regulations for the safe supply, distribution and consumption of natural gas" did not confer power to fix the price of such gas, and unanimously overruled the contrary decision in *Rushville* v. *Rushville Natural Gas Co.*, 132 Indiana, 575, 584, rendered the year before by a divided court. In its opinion in the *Lewisville* case, the court quoted the rules of construction for the ascertainment of municipal powers as laid down by Judge Dillon and approved by the Supreme Court of Illinois in numerous cases (cited *supra*, p. 8, *et seq.*), and added (p. 52):

> "There is not a word or a syllable to be found in this act indicating that the general assembly had in view any other purpose than that of securing the safe supply and use of natural gas. To secure the safe supply and use of natural gas is one thing, and to fix the price at which gas shall be supplied is another and quite a different thing. In our opinion, it was not the intention of the general assembly to confer, by the act above set out, the power to regulate the price at which natural gas should be furnished. It follows that the conclusion reached in the case of the *City of Rushville* v. *Rushville Natural Gas Co.*, *supra*, was erroneous and should be overruled."

The *Lewisville* case has ever since been followed in Indiana without dissent; and the rule that the specific power to fix the price of gas is not to be in-

cluded in a general municipal power of regulation is firmly established in that state. *City of Noblesville* v. *Noblesville Gas, etc., Co.*, 157 Indiana, 162, 166; *Muncie Natural Gas Co.* v. *City of Muncie* (Ind. 1903), 66 N. E. 436, 438; *Rushville Nat. Gas Co.* v. *Morristown* (Ind. App. 1903), 66 N. E. 179, 181.

In *Schroeder* v. *Gas & Water Co.*, 20 Pa. Superior Ct. 255 (1902), statutory power of a city "to make ordinances, by-laws, rules and regulations, not inconsistent with the constitution and laws of the commonwealth, for the maintenance of the peace, good government and welfare of the city, and its trade, commerce and manufactures" (which power was said by the court to be "but a defined statement of the police power of any municipality") was held not to include the power to fix rates for water to be supplied by a water company.

To the same effect are *State ex rel. City of St. Louis* v. *Laclede Gas Light Co.*, 102 Missouri, 472, 486; *Wabaska Electric Co.* v. *City of Wymore*, 60 Nebraska, 199, 202; *Tacoma Gas & Electric Light Co.* v. *Tacoma*, 14 Washington, 288, 293; *Detroit Citizens' St. Ry. Co.* v. *City of Detroit*, 64 Fed. Rep. 628, 639; *Cleveland City Ry. Co.* v. *City of Cleveland*, 94 Fed. Rep. 385, 396, affirmed 194 U. S. 517. And a diligent search has failed to disclose the decision of any court to the contrary.

The case of *Commonwealth* v. *Gage*, 114 Massachusetts, 328, is not, as the head note may seem to indicate, authority for the proposition that municipal power to fix a maximum fare for the carriage of persons in hackney carriages may be derived from a simple grant of authority contained in the Massachusetts General Statutes, c. 29,

§ 14, "to make regulations for carriages." An examination of that section together with other authorities cited in the opinion, shows that there could have been no intention of basing the municipal power to fix the rates of hackney coachmen on that provision alone. The power which the city of Boston exercised had been expressly and unequivocally conferred upon it by statute, and this source of its power must have been in the mind of the court when its short opinion was rendered. The statute was probably so familiar to court and counsel that there was no occasion to refer to it at length in the opinion, and no question as to the sufficiency of municipal authority appears to have been raised or discussed. The section of the General Statutes referred to in the opinion (section 14 of c. 29) expressly recognizes as unimpaired "the right of a city to make by-laws relating to the same subject." The opinion also refers to *Commonwealth* v. *Stodder*, 2 Cush. 562, 574, and *Commonwealth* v. *Duane*, 98 Massachusetts, 1. In the latter case, the existence of sufficient municipal authority was assumed without reference to the statute conferring it. In the former case, however, the authority of the city to regulate hackney coachmen under the statute of 1796, c. 32, is cited, section 6 of which act reads in part as follows:

> "And be it further enacted, that a major part of the selectmen be authorized and empowered to make such rules and regulations, establishing the rates and prices to be paid for the carriage and conveyance of persons in said hackney coaches within the limits of the town of Boston, as they may from time to time judge reasonable, regard being had to the time and distance."

This power of the selectmen was not abrogated by the charter of the city of Boston (Mass. L. 1821, c. 110) enacted pursuant to the second article of amendment to the Massachusetts Constitution, adopted in 1820. On the contrary, section 13 of the charter expressly confirms and reinvests all of the pre-existing powers of the selectmen "in the mayor and aldermen, as hereby constituted, as fully and amply as if the same were herein specifically enumerated." The effect of the city charter was only to change the form, not the powers, of the city government. *Hill* v. *Boston*, 122 Massachusetts, 344, 356.

To avoid misunderstanding, it should be emphasized that the power here referred to is a power to *regulate* charges, *i. e.*, to establish at any time what they shall be, or what they shall not exceed. This is totally distinct from a power to fix charges as a condition of the grant of the right to occupy or tear up the streets, or to prosecute any business within the municipal limits. Where a municipality has exclusive control over its streets, it may grant rights in them upon such reasonable terms as it may see fit, including a limitation on the charges which the party using the streets may require the public to pay for the services rendered. Such a limitation of charges is merely an exercise of the contractual powers of a municipality, and has nothing whatever to do with its police power, or with any power analogous thereto. *People* v. *Suburban R. R. Co.*, 178 Illinois, 594, 604; *People's Gas Light & Coke Co.* v. *Hale*, 94 Ill. App. 406, 420; *Freeport Water Co.* v. *Freeport City*, 180 U. S. 587, 593, 598; *Decatur Gas Light Co.* v. *City of Decatur*, 120 Illinois, 67, 68.

The decisions in *Union Traction Co.* v. *City of Chicago*, 199 Illinois, 484, and the *Water* cases, so-called (*City of Danville* v. *Danville Water Co.*, 178 Illinois, 299; 180 Illinois, 235; 186 Illinois, 326; 180 U. S. 619; *Rogers Park Water Co.* v. *Fergus*, 178 Illinois, 571; 180 U. S. 624; *Freeport Water Co.* v. *Freeport*, 186 Illinois, 179; 180 U. S. 587), also tend strongly to sustain the proposition that the city has no such power of regulation as is claimed in the case at bar. In the *Traction* case, it was held that two subdivisions of the same section of the City and Village Act conferring power (*forty-second*) "to license, tax and *regulate* hackmen, draymen, omnibus drivers, carters, cabmen, porters, expressmen, and all others pursuing like occupations, *and to prescribe their compensation*," and (*ninety-sixth*) "to pass all ordinances, rules, and make all regulations proper or necessary to carry into effect the powers granted," conferred authority to fix maximum street car fares. A careful consideration of the statutory provisions involved in that case will show that the legislature fully understood the limited scope of a general municipal power to *regulate* and clearly expressed its intention that such power should have only limited scope and should not include the power to fix maximum charges. This is apparent when it is appreciated that, after conferring the general powers "to license, tax and *regulate*," the legislature, in order to confer power to fix charges, deemed it necessary to add the words, "*and to prescribe their compensation*."

In the *Water* cases, it was held, among other things, that section 1 of article 10 of the City and Village Act

(1 Starr & C. Ann. Stat., 2d ed., p. 786) conferring municipal power "to authorize any person or private corporation to construct and maintain the same [water works] *at such rates as may be fixed by ordinance*, and for a period not exceeding thirty years," was sufficient to authorize the fixing of maximum water rates by various municipalities throughout the state. The decision on this point in each case was based solely upon the plain expression, "such *rates* as may be fixed by ordinance," certainly not upon any implication from the general power to regulate water works and water companies or to pass and enforce police ordinances found elsewhere in the same statute. 178 Illinois, 311–312; 180 U. S. 587, 593, 601.

B.

AS TO THE SIXTY-SIXTH SUBDIVISION OF SECTION 1, ARTICLE V, OF THE CITY AND VILLAGE ACT.

Subdivision *sixty-sixth* of section 1, article V, of the City and Village Act of 1872, confers power—

> "To regulate the police of the city or village, and pass and enforce all necessary police ordinances."

It would surely be an extraordinary stretch of language to hold that this general grant to the city council of power to regulate the police of a city and to pass and enforce necessary police ordinances was intended by the legislature to invest the city council with the governmental or legislative power to regulate rates. The statute does not delegate to the city council general police power but simply power to pass and enforce "necessary police ordinances." There must needs be a vast difference between a grant of power to regulate the police of a city or village and to pass police ordinances,

and a delegation of the police power of a state. Speaking of the latter, Mr. Justice Harlan said, in *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 661: "In its broadest sense, as sometimes defined, it includes all legislation and almost every function of civil government."

In the pending case of *Mills* v. *City of Chicago*, 127 Fed. Rep. 731, where the court decided the precise question now under consideration, Circuit Judge Grosscup said (p. 734):

> "It is plain to me that the sixty-sixth section, while granting power to regulate the police of the city or village, cannot be enlarged to include power to regulate the prices of gas. The power delegated by the state to the city is not the police power of the state. To so construe it would be to invest the city with nearly all the powers of the state—make the city practically a state by itself. Such manifestly was not the purpose of the section."

The consequence of now holding that a grant of power to pass and enforce all "necessary police ordinances" included a power to regulate the price of gas, water, telephones, electric lights, warehousemen, etc., etc., would be a great deal more than merely sustaining this particular ordinance. It would necessarily involve holding that the provision quoted was intended to grant to the smallest village as well as to the largest city unlimited police power, as absolute as that of the state itself, according to the broadest view of police power that has ever been taken; for, if the phrase "necessary police ordinances" covers the regulation of the price of gas, it must also cover not merely the

regulation of prices for all other public services, but the regulation of all other acts except those relating to taxation and finance. In fact, if clause 66 could receive the interpretation now contended for by the city, all but four or five of the other ninety-five clauses in article V would be superfluous. In order to sustain the city's contention, a rule of statutory construction hitherto unknown in jurisprudence must be formulated and declared.

It must be clearly evident to the court, as the only reasonable and true construction, that the legislature simply intended to confer upon the municipalities of the state the power to regulate their local police or constabulary, as it is termed in England, and to pass such necessary police ordinances as are appropriate or adequate to protect the public morals, the public health and the public safety and to promote the good order and peace of the community.[1]

The saying is, indeed, trite that most of the confusion in the law results from the use of inappropriate or indefinite terminology. It would obviously tend to avoid much confusion if the term, "police power" were confined and limited to those restraints upon private rights and liberties or to those punishments which the morals, health, or peace of the community may require, and if other legislative enactments, such as the regulation of the rates of public carriers, warehousemen and those

[1] 4 Blackstone Com. 162; Bentham's General View of Public Offenses (Edinborough ed. of Works, Part IX, p. 157); *Wilkie* v. *City of Chicago*, 188 Illinois, 444, 450–451; *Wice* v. *C. & N. W. Ry. Co.*, 193 Illinois, 351, 353.

engaged in more or less public occupations, were embraced within the term "general governmental or legislative powers." Rules observed by the courts in construing statutes relating to public health, morals, or peace, have no application whatever to many statutes relating to the use of property, the carrying on of trade or business, etc. For example, it has been repeatedly held that the right to exercise the police power cannot be parted with by the legislature because "no legislature can bargain away the public health or the public morals."[1] Yet, a legislature could clearly grant to a railroad, gas, or water company the right to charge fixed rates, and such a grant, duly accepted and based on consideration, would be held to be a contract protected by the federal constitution. Nevertheless, it could be suggested, as we have seen above, that such a grant would be a bargaining away of the police power, because the right to regulate charges has been said to be embraced within the police power. Many other examples might be given to illustrate that the loose use of the term "police power" is misleading, that this term should be confined to statutes or regulations affecting the public health, morals, or safety, and that other subjects of legislation, such as the regulation of rates, should be recognized as coming within the scope of those general governmental powers which are inherent in the legislative branch of our form of republican government. A classification of this kind would simplify the consideration of many cases, and would avoid much apparent conflict. Rules which are wise and necessary in construing police

[1] *Stone* v. *Mississippi*, 101 U. S. 814, 819.

power in the narrower sense indicated, would then be recognized at once to be not at all applicable to the discussion of other governmental powers.

Professor Thayer, in a note to his work "Cases on Constitutional Law," part II, 693, comments on the misuse of the term "police power," and, among other things, says:

> "Discussions of what is called the 'police power' are often uninstructive from a lack of discrimination. It is common to recognize that the subject is hardly susceptible of definition, but very often, indeed, it is not perceived that the real question in hand is that grave, difficult, and fundamental matter,—what are the limits of legislative power in general? . . . But often, the discussion turns upon the true limits and scope of legislative power in general,—in whatever way it may seek to promote the general welfare."

So, also, in *Lake Shore & Mich. South. Railway* v. *Ohio*, 173 U. S. 285, 297, Mr. Justice Harlan said:

> "It may be that such legislation is not within the 'police power' of a state, as those words have been sometimes, although inaccurately, used. But in our opinion the power, whether called police, governmental or legislative, exists in each state, by appropriate enactments not forbidden by its own constitution or by the Constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good."

And in the late case of *Knoxville Water Co.* v. *Knoxville*, 189 U. S. 434, 437, Mr. Justice Holmes, delivering the opinion of the court, said that it was "unnecessary

to consider whether the regulation of water rates is properly to be classed as a police power."

The court has not yet been called upon to differentiate "police powers" from "general governmental powers," but it cannot be doubted that when an appropriate case requires it to pass upon the subject, it will make the distinction and point out that the term "police power" should be confined to the narrower sense which we have indicated.

But the police power of a municipality is clearly something very much more limited than that of a state. A municipality has no powers inherent in sovereignty. Its police power is just as strictly limited by its charter as is any of its other powers. In fact, the broader the view taken of the inherent police power of a state, the more strikingly it contrasts with the limited and derivative police power of a municipality. No state, it is safe to say, has ever made a general grant to any municipality of such police power as the state itself possesses, to be exercised, within the corporate limits, as fully as the state could exercise it. On the contrary, such police power as is granted is always a restricted power, in some states broader and in others narrower, but always limited to what the legislature may regard as the needs of the municipality and its inhabitants. Hence Judge Dillon, in referring to municipal police power in general, does not treat it as a comprehensive power, granted as such, but merely as the aggregate of such particular powers as the legislature has seen fit to grant in regard to matters of police. He says: "Many of the powers exercised by municipalities fall within what is known as

the *police power* of the state, and are delegated to them to be exercised for the public good. Of this nature is the authority to suppress nuisances, preserve health, prevent fires, to regulate the use and storing of dangerous articles, to establish and control markets, and the like." (Dillon's Mun. Corps., sec. 141.)

In *Wilkie* v. *Chicago*, 188 Illinois, 444, 450, the city had passed an ordinance requiring each master plumber to pay a license fee of thirty dollars a year and imposing penalties for performing any plumbing work without taking out such license. The legislature had also prescribed certain conditions upon which plumbers might exercise their calling. A bill was filed to enjoin the enforcement of the ordinance, and the Supreme Court said:

> "A city has no inherent power to license any occupation or to exact a license fee from any person. The power to do so must be found in its charter, and it must be either expressly given or be a necessary incident to the carrying out of a power so granted. The power must be plainly and unmistakably authorized by the legislature. In this case, the power to enact sections 1415 and 1421 is claimed by virtue of clause 66 of section 1 of article 5 of the act for the incorporation of cities and villages, which gives the city council power 'to regulate the police of the city or village, and pass and enforce all necessary police ordinances,' and clause 78 of the same section, which authorizes the council 'to do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease.' If a city council attempts to exercise the powers so conferred, it is, of course, necessary that there should be some substantial relation between the means employed and the end authorized by the charter. *An ordinance passed in fulfillment of the objects embraced within the provisions*

in question must have some tendency to promote the public health, morals, security, comfort and welfare or to suppress disease. So far as this record shows, there was no connection whatever between the ordaining by the city council of sections 1415 and 1421 and the police power or the promotion of health or the suppression of disease. The bill to which the demurrer was interposed sets out the sections already quoted, and they are the only ones before us. The requirement of a license, with the exaction of a license fee, may be a proper and convenient means of regulating the business, but if there was any provision of the ordinance, in connection with the license under section 1415, designed to promote health or suppress disease, or coming within the exercise of the police power, it does not appear. Manifestly, it does not improve the health of the public or suppress disease to collect $30 from a plumber.

"There is no more relation between the public health and the collection of $30 from a person engaged in plumbing than there would be from a person engaged in any other business or occupation which in no way affects the public health. So far as the record shows, the city has done nothing except make a demand for $30 per year from each plumber, and there is not a trace of regulation for the public health or comfort or suppression of disease in the provision. As a mere exaction of money could not have the slightest tendency toward the ends contemplated by the clauses of the charter relied upon, the demurrer could not be sustained on the ground that such exaction was an exercise of the powers conferred by such clauses. The city has no power to tax the occupation of plumber, and does not claim to have such power."

This case is particularly instructive, because it demonstrates that the power to pass police ordinances is al-

ways confined within narrow limits and does not include the governmental power to regulate rates or license occupations. Otherwise, the court would have held that the power to pass police ordinances, if commensurate with what is usually the police power of the state, would necessarily have included the power to license plumbers or any other occupation.

So, also, the power granted by the City and Village Act to enact and enforce all necessary police ordinances (the very power under which the ordinance now in question was attempted to be passed) was held in the case of *Wise* v. *C. & N. W. Ry. Co.*, 193 Illinois, 351, 353, not to authorize an ordinance forbidding passengers from getting on or off trains in motion, unless permitted by those in charge, a regulation which, no one would doubt, was within the police power of the legislature. In that case, the court said:

> "Clause 66 of paragraph 62, article 5, of the act for the incorporation of cities and villages, provides that the city council shall have power 'to regulate the police of the city and pass and enforce all necessary police ordinances.' This is the provision of the statute relied on as conferring power on the city to pass the ordinance, and it can be sustained, if at all, only under the police power conferred on the city by this provision of its charter. In *Culver* v. *City of Streator*, 130 Ill. 238, in defining the police power, we said (p. 243): 'That power may be defined, in general terms, as comprehending the making and enforcement of all such laws, ordinances and regulations as pertain to the comfort, safety, health, convenience, good order and welfare of the public.' This definition is certainly broad enough to cover all the power the city had to pass the ordinance. The provision of the general in-

> corporation act is a delegation by the general assembly to the city of Chicago of police power to pass and enforce all necessary police ordinances—that is, ordinances necessary for the comfort, safety, health, convenience, good order and welfare of its inhabitants. . . . It is difficult to conceive of the necessity, as a police regulation, for such an ordinance, and it is only necessary police ordinances that the city is authorized to pass. True, by the word 'necessary,' 'indispensable' was not meant, but only such ordinances as would be conducive to, or beneficial or effective in, the promotion of the comfort, safety, health, convenience, good order, or general welfare of the municipal public."

See also *Kiel* v. *City of Chicago*, 176 Illinois, 137, 141; *Huesing* v. *City of Rock Island*, 128 Illinois, 465, 477.

Illustrations such as the above might be multiplied, but it must be sufficiently clear that the police powers of municipal corporations are not unlimited, and that no attempt to exercise municipal police powers can be upheld by a court unless it be clearly shown to have been authorized by the legislature.

In *State* v. *Sheboygan*, 111 Wisconsin, 23, it was contended that the fixing of maximum charges for the use of telephones in the city was a lawful police regulation to prevent extortion. The court said (p. 38):

> "This [contention] is based upon the assumption that the power of police control possessed by the city is unlimited. Such is not the fact. *Such power* is inherent in the state, and is a necessary attribute of sovereignty. It does not pass to the minor divisions of government except by express grant or by necessary implication from other powers granted."

So, in *In re Pryor*, 55 Kansas, 724, 728, it was said:

> "In certain cases the state may fix and regulate the prices of commodities and the compensation for services, but this is *a sovereign power*, which may not be delegated to cities or subordinate subdivisions of the state, except in express terms or by necessary implication."

It may even be questioned whether the words "or by necessary implication" do not go too far. No instance of any grant of such a power by implication was referred to, and none has been found after the most painstaking research.

See the very recent case of *State ex rel. Garner* v. *Missouri & K. Telephone Co.* (Missouri Sup. Ct., June 1, 1905), 88 S. W. Rep. 41, 43.

Upon this point it need only be added that if the language of clause 66 above quoted is so comprehensive as to include all the police powers which the legislature itself, as the sovereign legislative body, could exercise, most of the cases decided in Illinois in limitation of the powers of municipal corporations were entirely erroneous. The cases cited from the courts of Illinois, holding that particular powers did not exist in municipalities, related to matters which were clearly within the general police power of a legislature, if we use that term in its broadest sense. In each case, the power existed, as it exists in almost every municipality in the country, to adopt police ordinances, but until very recently the view has never been seriously advanced that the grant of the power to regulate the police or constabulary of a city or village and to pass necessary police ordinances

was commensurate with the governmental police power of the state itself.

CONCLUSION.

For these reasons, it is submitted that the city council of Peoria did not in 1900 possess the power to fix and regulate the price of gas.

WASHINGTON, October 30, 1905.

WILLIAM D. GUTHRIE,
Of counsel for Darius O. Mills.

APPENDIX.

(L. of Ill. 1905, p. 110.)

An Act to confer upon the city of Chicago the power and authority to sell surplus electricity and to fix the rates and charges for the supply of gas and electricity for power, heating and lighting furnished by any individual, company or corporation to said city of Chicago and the inhabitants thereof.

SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:*

That upon the adoption of this act in the manner hereinafter provided the city of Chicago shall have the power and authority to sell surplus electricity for heat, light and power within the corporate limits of said city, and is hereby empowered to prescribe by ordinance maximum rates and charges for the supply of gas and electricity for power, heating and lighting furnished by any individual, company or corporation to such city and the inhabitants thereof. Such rates and charges to be just and reasonable and may be fixed for a period not exceeding five years and in case the corporate authorities of any such city shall fix unjust and unreasonable rates and charges, the same may be reviewed and determined by the circuit court of the county in which said city is situated: *Provided*, that nothing in this act contained shall be construed as enlarging the powers now conferred by law upon said city to own, construct or acquire electric lighting plants, or as permitting said city to sell electricity so long as the same is needed for light, heat and power for municipal purposes.

§ 2. This act shall not be in force until the question of its adoption shall first have been submitted to the electors of such city and approved by a majority of those voting thereon. The city council of the city of Chicago may direct by ordinance that the question of the adoption of this act by the city of Chicago, be submitted to popular

vote at any general, city or special election in and for the entire city coming not sooner than thirty (30) days from and after the passage of such ordinance. The city clerk of said city shall certify the passage of such ordinance to the proper election officials and it shall thereupon be the duty of such election officials to submit the question of the adoption of this act by the city of Chicago to popular vote. The city clerk of the city of Chicago shall also give at least thirty (30) days' notice of such election by publishing a notice thereof in one or more newspapers of general circulation within such city.

§ 3. The ballots to be used at such election shall be in the following form:

For the adoption of an act entitled "An act to confer upon the city of Chicago power and authority to sell surplus electricity and to fix the rates and charges for the supply of gas or electricity and to fix the rates and charges for the supply of gas or electricity for power, heating and lighting furnished by any individual, company or corporation to said city of Chicago and the inhabitants thereof."	Yes	
	No	

If a majority of the votes cast upon said proposition at said election shall be voted for the adoption of this act it shall thereby and thereupon be adopted by and be in force in the city of Chicago.

Approved May 18, 1905.

FILE COPY.

No. 33.

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Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1905.

PEORIA GAS AND ELECTRIC COMPANY,
Appellant,

vs.

CITY OF PEORIA,
Appellee.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Brief on Behalf of the City of Chicago, Party to Another Pending Case, Involving the Question of the Power of Cities in Illinois to Fix the Price of Gas.

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Of Counsel.

WASHINGTON, NOVEMBER 21, 1905.

GEO. HORNSTEIN CO., PRINTERS, CHICAGO

the streets, the question occurs what regulation was there intended. The word "regulate" was a familiar word in legal nomenclature at the time the act in question was passed. The Federal Constitution provides, Article 1, Section 8, Clause 3, that Congress shall have power "to regulate commerce with foreign nations and among the several states and with the Indian tribes."

The rule is settled by a long line of decisions of this court and other courts that the word "regulate," as used in the Federal Constitution, conferred upon Congress the right to prescribe what taxes, duties and imposts might lawfully be levied upon interstate commerce, and to prescribe the maximum rates to be charged by public service corporations, engaged in such commerce.

It is plain that the legislature intended that the manner and method of laying gas pipes in the public streets should be regulated by the city council. It is equally plain that the legislature intended that gas companies could erect their factories and lay down their pipes in the streets and alleys of any city or village, subject to such further regulations as such city or village might by ordinance impose. It is equally clear that the word "regulations," as used in the last clause of Subdivision Thirteenth, referred to the exercise by the city or village of such portion of the police power of the state as was essential to prevent said gas companies from imposing upon the citizens unreasonable charges, or making against said citizens unreasonable discriminations.

It is a familiar rule that a public service corporation may be required, under the police power of the state, to do two things:

First: To furnish its commodities at a reasonable price.

Second: To furnish to every citizen upon equal terms.

The two methods of regulating gas companies last referred to were unquestionably the ones the legislature of this state had in mind when the City and Village Act above referred to was passed. It is unreasonable to assume that the broad and comprehensive language contained in the last clause of Subdivision Thirteenth would have been used had the legislature only intended to regulate the laying of gas pipes within the public streets, for that question had already been covered by prior particular and specific language, dealing with that very subject.

But counsel tells us that the general language, "subject to such regulations as any such city or village may by ordinance impose," should be construed to mean the same as the particular language above quoted in reference to regulating streets.

Independently of the absurdity of such a contention as a general principle of statutory construction, we must here bear in mind that the doctrine contended for by counsel is also directly contrary to the rule laid down by the legislature of Illinois for construing general provisions.

The Revised Statute of Illinois of 1845, page 473, reenacted in the revision of March 5, 1874, Hurd's Revised Statutes of Illinois, 1899, Chapter 131, Section 1, paragraph one, is as follows:

> "All general provisions, terms, phrases and expressions shall be liberally construed in order that the true intent and meaning of the legislature may be fully carried out."

The legislature of Illinois, then, was familiar with the rule of construction above quoted, and when it imposed upon corporations erecting gas factories within the state

the condition that said companies should be subject to such regulations as cities or villages might by ordinance impose, the legislature knew that the general language in reference to regulations should be liberally construed for the purpose of carrying out the intent of the legislature.

Construing the word "regulations" to mean nothing more than what had already been contained in the particular language above quoted, would be adopting a strict rather than a liberal construction, and would be directly contrary to the statute above quoted, and the repeated decisions of the Supreme Court of Illinois, construing that statute.,

People v. *City of Chicago*, 152 Ill., 546-51.
People v. *Hinrichsen*, 161 Ill., 223-27.
Givins v. *City of Chicago*, 186 Ill., 399-403.
People v. *Harrison*, 191 Ill., 257-66.

In *People* v. *City of Chicago*, *supra*, the court, applying this statute, said, page 551:

> "The General Assembly, in the act revising the law in relation to the construction of the statutes, lays down as the first rule to be observed the following: 'All general provisions, terms, phrases and expressions shall be liberally construed, in order that the true intent and meaning of the legislature may be fully carried out.' (2 Starr & Curtis Ann. Stat., Chap. 131, Sec. 1.) A thing within the intention is regarded as within the statute though not within the letter, and a thing within the letter is not within the statute unless within the intention."

In *People* v. *Hinrichsen*, *supra*, a narrow technical construction was contended for, similar to the one made by counsel for Mills in this case and the Supreme Court of Illinois said, page 227:

> "The legislature of this state, by the provisions of chapter 131 of the Revised Statutes, declared certain rules for the construction of statutes then in force or that might be thereafter enacted, and by the first and second subdivisions of section 1 of that chapter it is provided: 'First, all general provisions, terms, phrases, and expressions shall be liberally construed, in order that the true intent and meaning of the legislature may be carried out; second, words in the present tense include the future.' The legislature having declared these among other rules of construction of statutes, in the enactment of the law now under discussion must be considered as having used the language contained therein with knowledge of the principles of statutory construction and interpretation as adopted by the courts and declared by legislation."

In *People* v. *Harrison*, *supra*, the court, after quoting the above statute to the effect that general provisions, terms, phrases and expressions should be liberally construed, said:

> "The intention is to be gathered from the necessity or reason of the enactment and the meaning of words enlarged or restricted according to the true intent. (*Castner* v. *Walrod*, 83 Ill., 171; *Cruse* v. *Aden*, 127 *id.*, 231.) That which is implied is as much a part of the statute as that which is expressed."

It may be well, before proceeding further in this discussion, to call attention to another rule of statutory construction contended for by counsel for Mr. Mills, which is equally unsound. The sixty-sixth subdivision of Section 1 of Article V of the City and Village Act confers upon cities and villages the power "to regulate the po-

lice of the city or village, and pass and enforce all necessary police ordinances."

It is contended by counsel for Mr. Mills that the last portion of that subdivision, namely "to pass and enforce all necessary police ordinances" refers merely to the constabulary of the city or village and does not confer upon the municipality general police powers within its borders.

As we shall hereafter note, the construction contended for is directly contrary to the repeated decisions of the Supreme Court of Illinois. The last portion of the subdivision above quoted has been construed by the Supreme Court of the State of Illinois to mean that the municipality has, under that clause, the power to pass all ordinances that are necessary for the protection of the public health, the public morals and the public welfare.

And, as we shall also hereafter point out, the power to regulate the price charged by a public service corporation, doing business wholly within the municipality and dealing in a commodity that is indispensable for the health, safety and comfort of its inhabitants, is a part of the police power which was delegated to cities and villages under the sixty-sixth subdivision above quoted.

Counsel has invoked the doctrine that the enumeration of particular powers, by implication excludes from the legislative intent powers not enumerated, and in support of that proposition has cited a large number of authorities. And counsel argues that because the power to fix the rate of wharfage and dockage, and to prescribe the compensation of hackmen, and to establish ferries and toll bridges, and to fix tolls thereon, and to fix water rates, was conferred upon municipalities by express language to that effect, therefore the power to fix the rate at which

gas should be sold, not being enumerated in any of these provisions, is to be excluded from the legislative intent, and this, even though language amply sufficient to confer that power is contained in other independent general provisions of the statute.

The rule of interpretation in question is not to be applied in the unqualified manner claimed by counsel. Endlich on the Interpretation of Statutes, thus states the limitation of the rule, page 559, Section 399:

> "Whether the expression of one thing is to operate as the exclusion of another, is clearly a mere question of intention, to be gathered from the statute by the usual means and rules of interpretation."

And Sutherland, in his work on Statutory Construction, Volume 2 (2nd Edition), Section 491, page 916, thus states the same rule:

> "This maxim, like all rules of construction, is applicable under certain conditions to determine the intention of the lawmaker when it is not otherwise manifest. Under these conditions it leads to safe and satisfactory conclusions; but otherwise the expression of one or more things is not a negation or exclusion of other things."

The rule contended for is also subject to another important qualification. It is true that the enumeration of certain things in a statute by implication excludes other things not enumerated, but the rule has no application where in one portion of the statute certain particular things are enumerated and in another portion of the statute, general language is used that was clearly intended to embrace other things than the ones before enumerated in the other part of the statute.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1905.

PEORIA GAS AND ELECTRIC COMPANY,
Appellant,

vs.

CITY OF PEORIA,
Appellee.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Brief on Behalf of the City of Chicago, Party to Another Pending Case, Involving the Question of the Power of Cities in Illinois to Fix the Price of Gas.

STATEMENT OF THE QUESTION.

The appellant, the Peoria Gas and Electric Company, is a corporation organized under the General Incorporation Act of the State of Illinois and subsequent to the adoption by the state of the City and Village Act, approved April 10, 1872. On the 4th day of September, 1900, the City of Peoria passed an ordinance which provided that the maximum price of gas furnished to the City of Peoria and its citizens should not thereafter exceed the sum of 75 cents per thousand cubic feet, and prescribing the quality of said gas, and providing penalties for

violation of the provisions of said ordinance. The complainant, the Peoria Gas and Electric Company, filed a bill in equity in the Circuit Court of the United States for the Northern District of Illinois, to restrain the enforcement of said ordinance upon two grounds:

First: That the complainant could not afford to manufacture gas at the price above specified, and that the ordinance in question would compel it to conduct its business at a loss, in violation of the 14th amendment to the Federal Constitution.

Second: Upon the ground that the City and Village Act of the State of Illinois, approved April 10, 1872, and in force July 1, 1872 (1 Starr & Curtis Ann. Stat., 2 Ed., pp. 689-707), did not confer upon cities and villages within the State of Illinois, the right to regulate the price of gas.

On October 15, 1900, the City Council of the City of Chicago passed a similar ordinance to the one above described, also fixing 75 cents per thousand cubic feet as the maximum price to be charged for gas within the City of Chicago.

Darius O. Mills filed a bill in equity against the City of Chicago and the People's Gas Light and Coke Company in the Circuit Court of the United States, for the Northern District of Illinois, seeking to enjoin the enforcement of the above ordinance on the alleged ground that the corporation had refused to act, and that suit is now pending and undisposed of, and that bill also questioned the right of cities and villages in the State of Illinois during the year 1900 to regulate the price of gas.

The City and Village Act of 1872 confers upon city councils within the State of Illinois, certain powers that are enumerated in some ninety-six subdivisions, the ones

particularly pertinent to the question here under consideration being Subdivisions 9, 11, 13 and 66 of Section 1, Article V, found on page 274 in Hurd's Revised Statutes of Illinois for 1899:

> "Section 1. The city council in cities, and president and the board of trustees in villages, shall have the following powers: * * * "
>
> "Ninth: To regulate the use of the same. (Referring to streets.) * * * "
>
> "Eleventh: To provide for the lighting of the same. (Referring to streets.) * * * "
>
> "Thirteenth: To regulate the openings therein (in streets) for the laying of gas or water mains and pipes, and the building and repairing of sewers, tunnels and drains, and erecting gas lights: Provided, however, that any company heretofore organized under the general laws of this state, or any association of persons organized, or which may be hereafter organized for the purpose of manufacturing illuminating gas to supply cities or villages, or the inhabitants thereof, with the same, shall have the right, by consent of the common council (subject to existing rights), to erect gas factories, and lay down pipes in the streets or alleys of any city or village in this state, subject to such regulations as any such city or village may by ordinance impose."
>
> "Sixty-sixth: To regulate the police of the city or village, and pass and enforce all necessary police ordinances."

Counsel has discussed the above subdivisions under two heads, numbered respectively A and B, and we will pursue the same classification in our reply.

A.

AS TO SUBDIVISION THIRTEENTH OF SECTION 1, ARTICLE V OF THE CITY AND VILLAGE ACT.

Subdivision Thirteenth of Section 1 of Article V of the City and Village Act of 1872, above quoted, provides that corporations organized for the purpose of manufacturing illuminating gas to supply cities or villages with the same, shall have the right, "by consent of the common council (subject to existing rights), to erect gas factories, and lay down pipes in the streets or alleys of any city or village in this state, subject to such regulations as any such city or village may by ordinance impose."

This statute, then, confers upon gas companies the right to carry on their business and occupy the streets and alleys of cities and villages within the State of Illinois, upon two specific conditions:

First: That said companies must obtain the consent of the common council of said cities; and

Second: They must submit themselves thereafter "to such regulations as any such city or village may by ordinance impose."

The appellant, the Peoria Gas and Electric Company, derived its sole right to erect its factory and to lay down its pipes in the streets and alleys of the City of Peoria from the statute above quoted, and it obtained its consent to engage in the business of manufacturing gas from the City of Peoria.

In passing the ordinance reducing the price of gas to 75 cents per thousand cubic feet, the City of Peoria was but exercising its power of prescribing by ordinance the regulations under which the appellant should conduct its business within the City of Peoria.

The contention of appellant now is that the words, "subject to such regulations as any such city or village may by ordinance impose," refer solely to regulations respecting the laying of the pipes of the gas company in the streets and alleys of such city. The most superficial examination of this clause in connection with other language bearing on the question of streets and alleys will show that that contention is untenable.

Subdivision Ninth, in reference to streets, says: "To regulate the use of the same." The first part of Subdivision Thirteenth says: "To regulate the openings therein (in streets) for the laying of gas or water mains and pipes and the building and repairing of sewers, tunnels and drains and erecting gas lights."

It would appear, then, that the legislature, in Subdivision Ninth, above quoted, and in the first clause of Subdivision Thirteenth, just quoted, had fully and specifically covered the right of the city to regulate the laying of gas pipes and mains in the streets. There was no occasion and no necessity for any further language on that subject.

The regulation referred to in the last clause of Subdivision Thirteenth must of necessity, by a familiar rule of statutory construction, have had reference to other kinds of regulations.

It is a settled rule in the construction of statutes that full force and effect should be given to every phrase and word, and the presumption should never be indulged in that any clause or phrase is meaningless or is a mere repetition of prior language.

Discarding, then, as untenable, the contention that the "regulations" referred to in the last clause of Subdivision Thirteenth, had reference to the laying of gas pipes in

for Mills, was a case where the telephone company derived its right to use the public streets for its business directly from the state. The court held that the right of the municipality "to regulate its streets" did not confer upon the city the right to regulate telephone charges. As we have already observed, the legislature of this state has conferred upon municipal corporations two distinct powers on this subject:

First: The power of a municipality to regulate its streets and the laying of gas pipes therein.

Second: To impose upon gas companies erecting factories within the State of Illinois from time to time "such regulations as any such city or village may by ordinance" prescribe.

The last power above referred to, which is broad and comprehensive in its terms, was never conferred at all upon the municipalities in the numerous cases relied upon by counsel for Mills, and hence they are not in point in this case.

The case of the *City of St. Louis* v. *Bell Telephone Co.*, 96 Mo., 623, is of the same character. There the telephone company was granted a franchise from the state to transact its business, and the only power conferred upon the municipality was "to regulate its streets." The court there merely held that the power to regulate streets did not carry with it the power of the municipality to prescribe the maximum rates. Had the Missouri statute contained a specific provision in reference to the power of the municipality to regulate its streets and had the telephone company been given the right to transact its business within the municipality, subject to such regulations as the city council might by ordinance impose,

then the question before that court would have been similar to the one here under consideration.

The case *In re Pryor*, 55 Kansas, 724, is of the same character, for there the only power conferred upon the municipality was to regulate the laying of the pipes and mains in its streets.

The case of *Lewisville Natural Gas Co.* v. *State*, 135 Ind., 49, is of the same character. The question there before the court was the construction of a single section of the Statute of Indiana that conferred upon boards of trustees of the town the right, "to provide by ordinance reasonable regulations for the safe supply, distribution and consumption of natural gas within the respective limits of such town." The court there properly held that the word "safe" was a limitation upon every word in the act and that the legislature were there dealing solely with provisions for the public safety. This thought was strengthened, the court said, from the well known dangerous and combustible character of natural gas.

It is unnecessary to point out that the wide and comprehensive powers embraced within the statute here under consideration were not contained in that act, and it is also important to bear in mind that the State of Indiana had no statute providing that general terms, phrases and expressions should be liberally construed.

Other cases are cited by counsel for Mills along the same line, but an examination of the facts of each particular case will disclose that none of the cases have any tendency to sustain the contention of counsel.

Counsel also quotes from Judge Grosscup's opinion, to the effect that the interpretation contended for by counsel for Mills had been placed upon this statute by a num-

ber of the corporation counsels of the City of Chicago. The pages on which those opinions are to be found are not pointed out either by counsel or by Judge Grosscup. A painstaking examination of the opinions by the various corporation counsels named fails to sustain the claim thus broadly made. Some of the counsel referred to did not at all give the opinion contended for, others referred to the question in a rather vague and cursory way.

The opinions of Mr. Adams and Mr. Darrow, which are the only ones that deal with it in any extended way, are based upon lines of reasoning that are directly contrary to the decisions of the Supreme Court of Illinois above quoted from, and hence are entitled to no weight.

In this regard we may say that it is true that where the meaning of the statute is doubtful, the long continued and uniform construction placed upon that statute by the highest law officers of the government enacting it is entitled to some weight. Such opinions, however, should be disregarded if they are based upon reasons that are contrary to the decisions of the courts. The opinions are only entitled to weight in cases of doubt. There is no doubt in the case at bar. The power to regulate is conferred by plain and unambiguous language.

Again, it is only the opinion of the highest law officer of the government enacting the law that is entitled to such weight. The act in question was passed by the legislature of the State of Illinois. To come within the rule contended for, counsel would have to show that his view had been sustained by the uniform and long continued opinions of the attorney generals of the state.

It is plain that the opinions of some of the corporation counsels of one municipality in the state are not entitled to any consideration, for if each municipality within the

State of Illinois could make a law on this subject by its own practical construction, the result would be that we would have as many different laws on this question as there would be divergent views by the corporation counsels of the respective municipalities. Chicago would have one law, Peoria a different one, and Springfield still another. An argument that leads to consequences so absurd must necessarily be erroneous.

B.

AS TO THE SIXTY-SIXTH SUBDIVISION OF SECTION 1, ARTICLE V OF THE CITY AND VILLAGE ACT.

Subdivision Sixty-sixth of Section 1, Article V of the City and Village Act of 1872 confers upon the city council the power "To regulate the police of the city or village and pass and enforce all necessary police ordinances."

Much is said in the argument of counsel for Mills about the opinion of Circuit Judge Grosscup in the case of *Mills* v. *City of Chicago*, 127 Fed., 731. Judge Grosscup held in that opinion that the power "to pass and enforce all necessary police ordinances" was not intended to invest the municipality with the general police powers of the state, so far as the municipality was concerned, but that the Sixty-sixth Subdivision of said section related merely to regulating the constabulary of cities and villages. To use Judge Grosscup's exact language, page 734: "The section looked, not to the police powers of the state in its wide constitutional sense, but to police in the sense of a local constabulary."

Judge Grosscup probably was not aware when he rendered this opinion, that the identical language had been passed upon by many decisions of the Supreme Court of

Illinois, and that Judge Grosscup's contention was utterly refuted by the opinions of that court.

It is unnecessary to remind this court that where a statute has received a settled construction by the highest court of the state enacting it, that construction is binding upon the Federal Court. It is therefore useless to determine as an original proposition whether Judge Grosscup's opinion is right or wrong, for the very question now under consideration had already been decided adversely to Judge Grosscup's ruling by many prior decisions of the Supreme Court of Illinois.

The identical argument contained in Judge Grosscup's opinion was addressed to the Supreme Court of Illinois in the case of *McPherson* v. *Village of Chebanse*, 114 Ill., 46. The village there had enacted an ordinance prohibiting persons from keeping open their places of business in the village on Sunday. There was no authority conferred upon the cities and villages in the state to pass a Sunday-closing ordinance, except by virtue of Subdivision Sixty-sixth of Section 1 of Article V above quoted. Speaking on this very point, the court said, page 49:

> "Subdivision 66, of Section 62, Article 5, of the 'Act to Provide for the Incorporation of Cities and Villages' (Rev. Stat. 1874, p. 221), gives the power 'to regulate the police of the city or village, and pass and enforce all necessary police ordinances.' Under this grant of power, we are of opinion there is found authority for the passage of the ordinance.
>
> "It is insisted this clause only refers to the organization and regulation of a police force. We think this a too narrow construction—that the clause is not limited in its application to police officers, but may extend to and embrace a subject matter of police regulation, under the general police power of the state."

The *McPherson* case, *supra*, then, is a direct authority for the proposition that Subdivision Sixty-sixth, *supra*, confers upon municipalities within the state the general police powers of the state, so far as said power is necessary for the carrying on of the municipal government, and that the power there conferred is not, as Judge Grosscup contended, limited to the regulation of the village constabulary. That opinion has ever been adhered to by the Supreme Court of Illinois.

The same question was again before the Supreme Court of Illinois in the case of *City of Chicago* v. *Gunning System*, 214 Ill., 629. It was there held that the power to regulate the manner and method of using signs and bill boards upon private property was properly embraced within paragraph 66, *supra*. After quoting with approval the *McPherson* case and the *Gundling* case above referred to, the court said:

> "Paragraph 66 confers upon cities power to regulate the police of the city or village and pass and enforce all necessary police ordinances. We held in the case of *McPherson* v. *Village of Chebanse*, 114 Ill., 46, that the power conferred under this clause is not limited in its application to the organization and regulation of a police force, but it is extended to embrace the subject matter of police regulations under the general police power of the state."

Again, the court, in the same case, speaking of the nature of the general police power of the state that was conferred upon cities and villages by Subdivision 66 of Section 1, Article 5, said:

> "The police power of the state is an adherent or plenary power, which enables the state to prohibit all things hurtful to the comfort, safety and welfare

> ize municipalities to pass reasonable ordinances covering said subject. Paragraph 66 confers upon cities power 'to regulate the police of the city or village and pass and enforce all necessary police ordinances.' We held in the case of *McPherson* v. *Village of Chebanse*, 114 Ill., 46, that the power conferred under this clause is not limited in its application to the organization and regulation of a police force, but it is extended to embrace the subject matter of police regulation under the general police power of the state."

The case above quoted from is on all fours with the case at bar. Every argument advanced by counsel in support of the contention that a failure to enumerate the regulation of the price of gas when the other subjects were under consideration, by implication excluded the granting of that power in subsequent subdivisions, are equally applicable to the *Gunning* case above quoted from.

It appears in the language of counsel "that the legislature was entirely familiar with the terms usually employed" in conferring upon a municipality the power to regulate the use of signs and hand bills. The failure, however, of the legislature in the *Gunning* case, *supra*, to use in reference to regulation of hand bills upon private property "the same exact and simple language deemed by it necessary for that purpose" in the case of the use of signs upon public property, was not regarded by the Supreme Court of Illinois as any reason for holding that the power to regulate the use of signs upon private property was not embraced within the general language of subdivision sixty-sixth.

Again, in *McPherson* v. *Village of Chebanse*, 114 Ill., 46, the question before the court was whether the Village of Chebanse had under the City and Village Act of

Illinois, above referred to, the power to prohibit persons from keeping their places of business within the village open on Sunday.

The ninety-sixth subdivision of Section 1 of Article V of the City and Village Act contained numerous specific and precise enumerations of powers conferred upon cities and villages of exactly the same kind as those in reference to providing for the closing of places of business on Sunday, and yet not one word is said in any of the ninety-six subdivisions in reference to the powers of cities and villages to prescribe Sunday closing ordinances.

Counsel for the Village contended in the *McPherson* case, *supra*, that the power was found in Subdivision 66 of Section 1 of Article V, which reads as follows: "To regulate the police of the city or village, and pass and enforce all necessary police ordinances."

Counsel for the defendant contended that the granting of power to pass certain specific regulations should be construed as if the statute in express terms had inhibited the granting of powers not enumerated, and counsel cited in support of his proposition, page 46, the case of *City of Cairo* v. *Bross*, 101 Ill., 475, the very case so much relied upon by counsel for Mills in his brief.

The court held that this argument was untenable and said, referring to the general grant of power contained in Subdivision Sixty-sixth of Section 1, Article V:

> "Under this grant of power we are of opinion there is found authority for the passage of the ordinance."

Sunday-closing regulations were thoroughly familiar to our Anglo-saxon forefathers. Such laws had been in

existence in England and in the Atlantic States for generations. The legislature had delegated to the municipality by exact and simple language, numerous police powers of a kindred character and the legislature were familiar with Sunday-closing regulations and with the kind of language that could be used for the purpose of granting the authority to municipalities to make such regulations in the same precise and direct way that other powers had been granted.

All of the above arguments, however, were held untenable by the Supreme Court of Illinois in the *McPherson* case, *supra*, and the existence of the power to enact Sunday-closing ordinances under the general grant of Subdivision Sixty-sixth was fully sustained.

We might multiply authorities from the Supreme Court of Illinois on this question, but a further citation of them would seem unnecessary. It must be clear that the doctrine contended for by counsel has no application to the question here under consideration. But it is unnecessary to pursue this discussion any further for there is no law that requires the legislature to use exactly the same words in conferring legislative powers upon a municipality.

The word "regulate" as applied to any business or calling, means the right to prescribe the maximum charges that can be made by persons engaged in that line of business. The precise question was before the Supreme Court of Colorado in *Golden Canal Co.* v. *Bright*, 8 Colo., 148. There an act of the legislature was passed, conferring upon county commissioners authority "to regulate the use of water for irrigation." The question before the court was whether the language above quoted was sufficient to authorize the commissioners to

prescribe the maximum price to be charged for water. The court held that such power was conferred by the language above quoted from the title of the act, and said, page 149:

> "In the law before us the legislature attempts to regulate the use of water thus furnished and sold by respondent and others who engage in such enterprises. Prominent among the matters involved in this regulation is the price to be charged; the phrase, *regulating the use*, is not confined to the forbidding of injustice in the distribution, the prevention of waste or the apportionment in times of scarcity; it is broad enough to include the frustration of unfair exactions, and the fixing of reasonable rates. To deny this would be to give the expression a narrow and restricted meaning, instead of construing it liberally, with a view to carrying out the legislative intent."

In *Denninger* v. *Recorder's Court*, 145 Calif., 629, the question before the court was whether the Constitution of the State of California had delegated to municipal corporations the right to regulate gas rates. The provision conferring that power was as follows:

> "Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws."

Speaking of the authority conferred by this language the court said, page 631:

> "By this section the people have made a direct constitutional grant of the police power of the state to every municipal corporation for local purposes. It is conceded by the petitioner that the general grant of legislative power in the constitution of a state

includes the power to regulate gas rates by statute, and that this power may be delegated by statute to municipal corporations. If this is so, and if the regulation of gas rates by the state is an exercise of the police power, it would be difficult to say why, in the absence of more specific provisions in our Constitution, relating to this matter, the municipal corporations of the state could not by virtue of the section above quoted, adopt and enforce within their local limits ordinances as comprehensive, both as to the establishment of rates and the infliction of penalties, as the statutes which the legislature is competent to enact for the state at large."

By Article 1, Section 8, Clause 3 of the Federal Constitution, Congress was given the power "to regulate commerce."

It has been held that the word "regulate" as used in that instrument, conferred upon Congress, the exclusive right to prescribe what taxes, duties and imposts might lawfully be imposed upon Interstate Commerce and to regulate the maximum rates to be charged by public service corporations engaged in such commerce.

Speaking on this subject, this court said in *Welton* v. *State of Missouri*, 91 U. S., 279-81:

> "The power to regulate conferred by that clause upon Congress is one without limitation; and to regulate commerce is to prescribe rules by which it shall be governed,—that is, the conditions upon which it shall be conducted; to determine how far it shall be free and untrammelled, how far it shall be burdened by duties and imposts, and how far it shall be prohibited."

So this court, in defining the word "regulate," said, in *St. Louis* v. *Western Union Telegraph Co.*, 149 U. S., 465-9:

> *"The word 'regulate' is one of broad import. It is a word used in the Federal Constitution to define the power of Congress over foreign and interstate commerce and he who reads the many opinions of this court will perceive how broad and comprehensive it has been held to be."*

In *Kaiser* v. *I. C. R. R. Co.*, 18 Fed., 151, the question before the court was whether the power "to regulate commerce with foreign nations and among the several states," conferred upon Congress by the Federal Constitution, embraced the power to regulate the maximum rates to be charged by railroad companies engaged in interstate commerce.

In determining the meaning of the word "regulate," as used by our Constitution, the court said:

> "To fix or limit the charges for such transportation is to regulate commerce."

In *Ames* v. *Union Pacific Railroad Co.*, 64 Fed., 165, Mr. Justice Brewer, speaking on the same subject, said, page 178:

> "But within the scope of the word 'regulation' as commonly used, is embraced the idea of fixing the compensation which the owners of railroad property shall receive for the use thereof."

Numerous cases are cited by counsel to the effect that the right of a municipal corporation to control its streets and alleys and to regulate the laying of telephone and telegraph wires, does not confer upon the municipality any authority to regulate rates. We do not at all dispute the soundness of those decisions. For instance, the case of *State* v. *Sheboygan*, 111 Wis., 23, cited by counsel

All the cases cited by counsel for Mills are where the legislature had enumerated particular things and then remained silent. Of course, under those conditions, the things not enumerated were by implication excluded. The rule contended for has never been applied to a case where there was in one portion of the statute an enumeration of particular things, and in another portion of the statute, a general provision which clearly was intended to embrace other things than the ones contained in the particular enumeration.

The case of *City of Chicago* v. *Gunning System*, 214 Ill., 628, contains a forcible refutation of counsel's contention. That case involved the construction of the very statute now under consideration, namely Subdivision Sixty-sixth of Section 1, Article V of the City and Village Act. There, the City of Chicago passed an ordinance, regulating the size and method and manner of placing bill boards upon private property within the City of Chicago. A bill in equity was filed by the Gunning System, claiming that while the City of Chicago had the right to regulate signs and bill boards upon streets and alleys and public property of the city, no such power had been conferred upon the city council by the legislature of the state, in reference to regulating the placing of signs on *private* property.

Section 1 of the City and Village Act of the State of Illinois, dealing with the power of the city council, contains ninety-six subdivisions. Subdivision Seventeenth of said Act is the only one that contains any reference to regulating bill boards and signs, and that subdivision conferred upon the city council the following powers:

> "To regulate and prevent the use of streets, sidewalks, and public grounds for signs, sign-posts, awn-

ings, awning-posts, telegraph posts, horse troughs, rocks, posting hand bills and advertisements."

The doctrine contended for by counsel was there invoked that the granting to the city council of the power to regulate the use of signs and hand bills upon the streets, sidewalks, and public grounds, without saying one word about regulating the use of signs and hand bills upon private property, by necessary implication excluded the power of the city council to make any regulations in reference to placing said signs and bill boards upon private property.

The Supreme Court of Illinois held that the particular enumeration of the right of the city to regulate the use of signs on the streets and public places did not by implication exclude the right of the city to regulate the use of signs upon private property and further held that that power was conferred by Subdivision Sixty-sixth of Section 1, Article V.

Speaking on this subject, the court there said, page 634:

> "It is claimed by appellee that under clause 17 of section 2 (should be section 1), article 5, of the City and Village Act, the city can regulate and prevent the use of signs on the streets and public places of the city; that this is a specific provision relating to signs, and that the power thus expressly granted cannot be added to by the general language found elsewhere in the act, and that there is no authority conferred by statute upon municipalities to regulate bill boards erected upon private property. We cannot agree with this contention, but are of the opinion that there is ample power, under paragraphs 66 and 75 of section 1, article 5, of the City and Village Act (Hurd's Stat., 1899, p. 277), to author-

sonal view and was neither intimated nor suggested by the Supreme Court of Illinois. Indeed, the very reasoning of that court by which it reached the conclusion that the City of Chicago had no such power would as a necessary corollary deny the exercise of that power by the state. The inhabitants of a state have the right to go and come when and where they will, so long as so doing does not interfere with anybody else's rights or the public welfare.

Counsel for Mr. Mills says that it would "tend to avoid much confusion" if the term "police power" were confined to narrower limits and if it were so interpreted as not to embrace the power of the government to regulate the rates charged by public service corporations.

We wish to suggest that there is at the present time no confusion on that subject. The question we are here dealing with is the construction of a statute of the State of Illinois. The right of the government to regulate the charges of a person devoting his property to a public use has been held by the Supreme Court of Illinois to be the exercise of the police power. The decisions in that regard are uniform and conclusive. Those decisions are binding upon this court in interpreting the same statute. Again, we do not believe there is any confusion on that subject in the decisions of this court. Ever since the decision by this court of *Munn* v. *Illinois*, 94 U. S., 125, governmental regulations in reference to the rates charged by persons devoting their property to a public use have been interpreted by this court to be the proper exercise of the police power. Counsel's argument that a definition of the police power different from the one previously expounded and declared by the courts, would tend to avoid confusion, should be addressed to the legislative and not to the judicial department of the government.

Counsel also calls attention to the act of the State of Illinois, approved May 18, 1905, conferring upon the City of Chicago the power to sell surplus electricity and to fix the rates and charges for the supply of gas and electricity and argues that the passage of that act tended to prove that the city had no power prior thereto to regulate the price of gas. The passage of that law in no wise tends to prove that the power to regulate the price of gas did not exist in prior legislative acts. The law in question gave the City of Chicago the power to sell surplus electricity, something that it had never possessed under any prior grant of power. Again, it provides that where the manufacturer of gas claims that the rate fixed is unreasonably low, an application must be made to the Circuit Court of the county in which said city is situated for the purpose of determining that question. Those were important innovations in the law that fully justfied the legislature in enacting it. Again, the power of the city to regulate the price of gas had been questioned and the fact that the legislature out of abundant caution inserted that provision into the present act in no wise tends to show that the power had not been conferred under previous legislative acts.

We respectfully submit that the power to regulate the price of gas during the year 1900 was vested in the city council of the City of Peoria as a part of the police power of that municipality, delegated to it under the statutes of the State of Illinois.

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